

Mr. Chairman and members of the Subcommittee:

My name is John H. Pickering and I am here today on behalf of the American Bar Association, the world's largest voluntary professional organization with more than 400,000 members. I appear before you today in my capacity as former Chair of the Commission on Law and Aging, the Senior Lawyers Division, and as a member of the ABA House of Delegates. The ABA has developed policy in many of the areas that protect vulnerable older people whether they have been found to lack capacity under state guardianship statutes, in Social Security capability determinations or in Veterans incompetency determinations.

#### I. Protection of Beneficiaries

In February 2002, the ABA adopted policy that is very directly related to the fiduciaries performance. While the policy was developed to apply to the Social Security Representative Payment program it is directly applicable to the Veterans Administration program. In part the policy provides as follows:

RESOLVED, that the American Bar Association urges the Administration to support and Congress to enact legislation that would strengthen the safeguards and protections of individuals receiving benefits under the Old Age, Survivors and Disability Insurance programs and the Supplemental Security Income program of the Social Security Act (Beneficiaries) which, because of such Beneficiary's disabilities and incapacities, are being received and managed by organizations designated by the Social Security Administration (SSA) as "representative payees." Such protections should include:

- (A) Replacement by SSA of any benefits misappropriated or misused by an organizational representative payee if not otherwise reimbursed;
- (B) Mandatory initial and continued bonding of organizational representative payees in all states where they provide services;
- (C) Forfeiture by representative payees of any fees normally allowed by SSA for any months in which an organizational payee has misused all or part of a Beneficiary's benefits; and
- (D) Authority for SSA to impose a civil monetary penalty against organizations which misuse, convert, or misappropriate payments for Beneficiaries received while acting in a representative payee capacity.

FURTHER RESOLVED, that SSA should require organizations or agencies that make application to serve as representative payees to:

- A) Provide advance notice of their intention to family members (parents, siblings, children, and grandparents) of Beneficiaries and to other legal representatives and, in so doing, advise such parties of SSA's general preference for appointment of individual payees, with a demonstrated interest in the Beneficiary, over organizational payees [20 C.F.R. §§ 404.2021, and 416.635, 640 and 645];
- B) Utilize all benefit payments received for the current exclusive use and welfare of the individual Beneficiary and make a maximum effort to conserve any unused funds to meet the special and future needs of such Beneficiary, pursuant to SSA's regulatory requirements and guidance on use, expenditure, and conservation of benefits [20 C.F.R. §§ 404.2035, 2040, and 2045 and 416.635, 640, and 645]; and
- C) Ensure that representative payees manage benefit payments in a way that prevents Beneficiaries from unnecessarily exceeding asset limits that would render them ineligible for federal benefit programs.

Not many years after enactment of the Social Security Program in 1936, Congress passed legislation granting the Social Security Administration (SSA) the power to appoint "representative payees" (RPs) to receive and disburse benefits for Social Security beneficiaries who were too frail, too young or too incapacitated to manage their own finances [currently laid out in 42 U.S.C. §405(j) for old age, survivor and disability benefits and §1383(a) for SSI benefit recipients]. That initiative took place in 1939, then covering retired workers, their spouses, their widows and children of deceased workers.

Today, the Representative Payment System is potentially available to all of the more than 50 million individuals receiving some form of Social Security benefit (including disabled workers and means-tested Supplemental Security Income beneficiaries whose benefit eligibility was established by legislative amendment several years after initiation of the RP system).

There are now more than 6.6 million persons whose benefits are actually under representative payee management, a group comprised of roughly 60% of children and 40% of

adults. This equates to an approximate (and surprising) caseload of 1 out of 8 Social Security Act benefit recipients in the United States. Moreover, that proportion promises to rise in the near future as the number of our aged (and frail aged) citizens with “baby boomer” roots attain Social Security retirement benefit ages and the incidence of SSI disabled child beneficiaries continues to expand.

In overall volume, the hybrid and mammoth “special guardianship” program represented by the federal RP system now exceeds by a factor of more than 10 the combined number of all court guardianships/conservatorships active in the 50 states (estimated at roughly 600,000). Fortunately, more than 80% of today’s RPs are parents, spouses, other relatives, friends of long standing, and court appointed guardians of the adult and child beneficiaries who they serve and, thus, can be generally counted on for loving and responsible benefit management. However, no program this large could avoid instances of fiduciary fraud and abuse. Such incidents have indeed occurred and these have been particularly troublesome in the area of multi-client “organizational payees.”

Organizational payees are typically non-profit agencies and organizations which serve as RPs for individuals without access to family members or close acquaintances who might be able to step in to meet their needs for responsible benefit management. Such organizations have a definite need to fill and most are responsible state institutions and community agencies with long histories of competent service. However, these entities, by their nature and the vacuum that they fill, frequently wind up in charge of the monthly Social Security income of 15 or 50 or 100 or 200 or more SSA beneficiaries with large accumulations of funds to administer on a regular basis and enormous power over the economic well being of the incapacitated individuals they have

been authorized to serve. Unfortunately there is a potential for many of the same problems with fiduciaries that serve Veterans.

The Veterans Administration allows for the appointment of a fiduciary for a beneficiary who is incompetent or unable to manage his or her own affairs. The beneficiary does not have to be adjudicated incompetent or rated incompetent by VA. Under the governing statute, whenever it appears that the interest of a beneficiary would be served by the appointment of a fiduciary, payment of benefits may be made to a relative or some other person or entity for the use and benefit of the beneficiary, regardless of any legal disability on the part the beneficiary. 38 USCA § 5502 (a). There are approximately 100,000 fiduciaries that serve veterans who are unable to manage their own affairs. In comparison to the Social Security Representative Payment program this is a small number. However it is approximately 3.3 percent of those who receive benefits from the Veterans Administration.

The Department of Veterans Affairs Office of Inspector General has commented over the years about needed changes for the Fiduciary Beneficiary System. In 1997 it stated that the Fiduciary System needs to be updated to reflect records of incompetent beneficiaries. (Report N.: 7R5-B13-129.) The September 2002 Summary Report by the Inspector General found eleven basics in the fiduciary and field examinations in 10 of the 18 VA regional offices.

(Report No. 02-01811-38) These included:

1. Ensure that the fiduciary activity supervisor meets annually with appropriate personnel at the supporting VA medical centers to coordinate visits to veterans in nursing homes and residential care facilities.
2. Ensure that Fiduciary and Field Examination staff follow up on delinquent fiduciary accountings.

3. Ensure that fiduciary accountings are reviewed with 14 days of receipt and appropriate follow-up actions are taken when necessary.
4. Ensure that field examiners: a) are notified of pertinent issues to be addressed during field examinations; b) conduct thorough field examinations; c) make appropriate recommendations or referrals; and d) appropriately file and distribute field examination reports.
5. Continue efforts to complete fiduciary accountings before fiduciary hearings.
6. Ensure that Fiduciary and Field Examination staff meet with VA medical center staff to discuss and coordinate services provided to incompetent veterans.
7. Advise OIG Investigators of incompetent veterans' abuse cases referred to Adult Protective Services.
8. Ensure that field examiners conduct thorough field examinations and make appropriate recommendations or referrals.
9. Provide enough staff to ensure that field examinations and fiduciary accountings are completed timely.
10. Follow up on delinquent fiduciary accountings by letter, telephone, or personal contact.

The OIG findings are similar to those found by the Social Security OIG with regard to the Representative Payment program. Numerous required accountings are not filed in a timely fashion and thus the agencies were unable to identify whether funds were spent on the Veteran. H.R. 743 passed by the House this spring suggested several avenues to deal with problems created in the Social Security Representative Payee program similar to those advocated by the

American Bar Association. The fiduciary program available through the VA could benefit by many of the same types of reforms. These reforms included elements such as bonding of payees, making whole the beneficiary when the payee misuses funds, and greater oversight on the part of the Veterans Administration for making sure that the system responded to the needs of the vulnerable beneficiary.

The American Bar Association appreciates the opportunity to be here today and provide some information about this important benefit for so many Veterans.